



The Secretary of Energy
Washington, DC 20585

May 14, 2001

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Representative Dingell:

This is in response to your letter of February 12, 2001, regarding your concerns relating to the litigation brought by the nuclear utilities due to the Department's delay in beginning to accept spent nuclear fuel for disposal, as well as your concerns relating to the adequate funding of the civilian radioactive waste program from the Nuclear Waste Fund. Responses to the individual questions you posed on these issues in your February 12 letter are enclosed.

Thank you for your continued interest in these matters.

Sincerely,

A handwritten signature in black ink, reading "Spencer Abraham".

Spencer Abraham

Enclosure



Questions and Answers Regarding the Department of Energy's High-Level Nuclear Waste Program

Question 1. Pending Litigation

Please provide a detailed summary of all pending litigation affecting the Department's repository program under the Nuclear Waste Policy Act of 1982, including the status of all suits pending before the U.S. Court of Claims. In addition, please summarize significant prior decisions affecting the program, including any Court of Claims rulings. To the extent possible, please outline the future timetable for pending cases.

Answer to Question 1. Pending Litigation

Background

In accordance with the Nuclear Waste Policy Act of 1982 (NWPA), DOE entered into contracts with more than 45 utilities, in which, in return for payment of fees into the Nuclear Waste Fund, the Department agreed to begin disposal of the utilities' spent nuclear fuel (SNF) by January 31, 1998. Because DOE has no facility available to receive SNF under the NWPA, and does not anticipate there will be such a facility until at least 2010, DOE has been unable to begin disposal of the utilities' SNF as required by the contracts. Significant litigation has ensued as a result of this delay.

Significant Prior Decisions Affecting the Spent Nuclear Fuel Litigation

To date, the courts have held that DOE's obligation to begin disposal of SNF is legally binding notwithstanding the lack of a facility to receive SNF, Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272 (D.C. Cir. 1996); that the utilities' remedies for DOE's failure to begin disposal of their SNF are to be determined as a matter of contract law, Northern States Power Co. v. U.S., 128 F.3d 754 (D.C. Cir. 1997), cert. denied, 119 S.Ct. 540 (1998); and that DOE cannot deny liability on the ground that its delay was unavoidable. Ibid. In addition, the Court of Appeals for the Federal Circuit has held that DOE is in partial breach of its contracts and that utilities are entitled to recover damages for that breach. Maine Yankee Atomic Power Company v. United States, 42 Fed. Cl. 582 (1998), aff'd, No. 99-5139 (Fed. Cir. Aug. 31, 2000), petition for rehearing and suggestion for rehearing en banc denied Dec. 12, 2000; Northern States Power Co. v. U.S., 43 Fed. Cl. 374 (1999), rev'd, No. 99-5096 (Fed. Cir. Aug. 31, 2000), petition for rehearing and suggestion for rehearing en banc denied Dec. 12, 2000. Thus, all that remains to be litigated is the amount of damages.

Pending Litigation

Currently, 16 utilities have filed suit in the Court of Federal Claims for breach of contract, in which they collectively seek \$5.82 billion in damages. In seven of the cases, the utilities did not specify damage amounts. The industry is reported to estimate that damages for all utilities with which DOE has contracts will be at least \$50 billion. DOE, however, believes that if it prevails on some key disputed issues the actual total damages suffered by all utilities as a result of the delay in beginning SNF disposal is more likely to be in the range of between \$2 billion and \$3 billion.

The cases involving 16 utilities and the damage amounts they seek, to the extent specified, include: Yankee Atomic Electric Co. v. United States, case no. 98-126C, \$70 million; Connecticut Yankee Atomic Power Company v. United States, case no. 98-154C, \$112 million; Maine Yankee Atomic Power Company v. United States, case no. 98-474C, \$106 million; Sacramento Municipal Utility District v. United States, case no. 98-488C, amount unspecified; Commonwealth Edison Company v. United States, case no. 98-621C, amount unspecified; Southern Nuclear Operating Company, Alabama Power Company and Georgia Power Company v. United States, case no. 98-614C, \$1.5 billion; Duke Power, a Division of Duke Energy Corporation, v. United States, case no. 98-485C, \$1 billion; Florida Power and Light Company v. United States, case no. 98-483C, \$1 billion; Indiana Michigan Power Company v. United States, case no. 98-486C, \$1 billion; Boston Edison Company v. United States, case no. 99-447C, amount unspecified; GPU Nuclear, Inc. v. United States, case no. 00-440C, amount unspecified; Northern States Power Company v. United States, case no. 98-484C, \$1 billion; Wisconsin Electric Power Company v. United States, case no. 00-697C, \$35 million; Power Authority of New York v. United States, case no. 00-703C, amount unspecified; Nebraska Public Power District v. United States, case no. 01-116C, amount unspecified; Omaha Public Power District v. United States, case no. 01-115C, amount unspecified.

One of the major issues in the determination of damages is the schedule by which the Department should have begun acceptance of the spent nuclear fuel. The Government recently filed a motion directed to the Chief Judge of the Court of Federal Claims and the 11 different judges before whom the 16 cases listed above are pending to assign the cases to a single judge for the purpose of adjudicating the common issue of a spent nuclear fuel acceptance schedule.

On February 20, 2001, the Government filed its replies to the nuclear utilities' oppositions to the reassignment motion. Briefing on this issue is completed and the litigants await a decision by the Chief Judge. The timing of the court's decision on this issue is unknown. If the Court determines the schedule issue should be adjudicated now, briefing and further proceedings on that issue likely would continue through the rest of this calendar year. If, however, the Court

denies the motion, the 16 cases could go forward individually, proceeding with various stages of discovery as the judges handling each of the cases direct.

Two other suits that have been filed relating to the Department's nuclear waste program are Alabama Power Co. v. DOE, case no. 00-16138-J, filed in the United States Court of Appeals for the 11th Circuit and Roedler v. United States, case no. 00-1204, pending in the United States Court of Appeals for the Federal Circuit.

In Alabama Power, eighteen utilities are seeking a declaration that the Department exceeded its statutory authority under the NWPA by executing a contract amendment with the nuclear utility, PECO Energy (now known as Exelon Generation Company), allowing a credit or reduction in its quarterly payments of fees into the Nuclear Waste Fund to compensate PECO Energy for the Department's delay in beginning to accept SNF. The utilities recently filed their initial brief in the case.

The Roedler case is on appeal to the Federal Circuit following a decision by the U. S. District Court of Minnesota granting the Government's motion to dismiss for lack of jurisdiction. The plaintiffs in Roedler are utility ratepayers who sought the return of fees paid into the Nuclear Waste Fund by Northern States Power. The District Court ruled that the plaintiffs are not third-party beneficiaries to the contract between utility Northern States Power and the Department and cannot maintain a breach of contract action under that contract. On October 4, 2000, a three-judge panel of the Federal Circuit heard oral arguments in the plaintiffs' appeal in this case. The panel has not yet ruled on the appeal.

Question 2. Funding Issues

- (a) Please provide an update of the budget figures addressed in Director Itkin's September 28, 2000, testimony before the Senate Committee on Energy and Natural Resources (*see* pages 7-8.)
- (b) Please provide an updated version of the Department's "Answer to Barton #1 Spreadsheet" which was provided to the Commerce Committee on February 8, 1999.

Answer to Question 2. Funding Issues

- (a) Director Itkin testified on September 28, 2000, that the FY 2001 request of \$437.5 million was needed to complete the work for a site recommendation in FY 2001 and for work related to the preparation of a license application. The

program was funded at \$391 million for FY 2001, approximately \$47 million less than requested.

(b) Enclosed is an updated version of the Department's "Answer to Barton #1 Spreadsheet," which was provided to the Commerce Committee on February 8, 1999. The outyear funding profile will be determined based on the Site Decision process.

3. Department of Justice Legal Opinion

- (a) Has the Department of Justice provided to DOE a legal opinion on the question of whether any damages awarded in litigation concerning the repository program should be awarded from the Nuclear Waste Fund or the Judgment Fund?
- (b) If so, please provide a copy of this opinion. If not, do you have any estimate of when this opinion, which the Department of Justice indicated it was preparing in February 1999, might be provided to DOE?

Answer to Question 3. Department of Justice Legal Opinion

(a) The Department of Energy requested from the Office of Legal Counsel (OLC) in the Department of Justice (DOJ) an opinion as to the source of funds to pay anticipated money judgments arising from the Court of Federal Claims litigation. The OLC responded to the Department's request in a March 28, 2001 letter to Acting General Counsel Eric J. Fygi. In that letter, the OLC stated that because of the Alabama Power litigation, which raises the source of funds issue, DOJ determined that it would take positions on the source of funding issue in briefs filed in that litigation, rather than provide an opinion. The OLC went on to state that its established practice is not to give legal opinions about issues pending in litigation.

(b) A copy of the Office of Legal Counsel's March 28, 2001 response to Acting General Counsel Eric J. Fygi is enclosed.

Enclosures

**SUMMARY OF
CASH FLOW FUNDING PROFILE FOR CURRENT PROGRAM AS OF 3-2001**
PLANNING ESTIMATES - IN MILLIONS OF YEAR OF EXPENDITURE DOLLARS

(REVISED 3/01 WITH TSLCC REV 1 COST ESTIMATES AND UPDATED 2000-2001 APPROPRS.)

FISCAL YEAR ¹	YUCCA MTN ³	TRANSP	PROG. MNGT.	TOTAL PROG. ^{2,3}	NEEDED AGGREG APPROP ^{2,3}	DEFENSE CONTRIB. ⁴	NWF APPROP ⁶	CBO BASELINE ⁷	UNFUNDED DEFENSE CATCHUP	UNFUNDED NWF	TOTAL UNFUNDED	FISCAL YEAR
FY 1999	310	0	44	354	354	-189	-165	-354	0	0	0	1999
FY 2000	303	5	45	353	353	-112	-241	-353	0	0	0	2000
FY 2001 ⁴	333	10	48	391	391	-200	-191	-391	0	0	0	2001
FY 2002	385	10	50	445	445	-204	-196	-400	-148	104	-44	2002
FY 2003	389	432	50	871	871	-208	-200	-408	-142	-321	-463	2003
FY 2004	407	478	50	935	935	-212	-204	-416	-238	-281	-519	2004
FY 2005	1024	215	50	1289	1289	-216	-208	-424	-324	-541	-865	2005
FY 2006	1102	245	50	1397	1397	-221	-213	-434	-444	-519	-963	2006
FY 2007	1046	245	50	1341	1341	-225	-217	-442	-448	-451	-899	2007
FY 2008	745	465	50	1260	1260	-229	-222	-451	-436	-373	-809	2008
FY 2009	620	540	50	1210	1210	-233	-227	-460	-432	-318	-750	2009
FY 2010	350	550	50	950	950	-238	-231	-469	-427	-54	-481	2010
TOTAL	7014	3195	587	10796	10796	-2487	-2515	-5002	-3039	-2754	-5793	TOTAL

* Congress provided for \$200M in Nuclear Waste Fund and \$191M in the Defense Nuclear Waste Fund for a total of \$391M. Congress previously appropriated funds from the Interim Storage Account. The net Budget Authority is \$313M for scoring purposes.

- The Fiscal Years have not been updated to start in FY 2001 to maintain consistency with the earlier cost estimate.
- The Program funding estimates reflect the Department's best projections, given the scope of the work identified and the planned schedule of required activities.
A new management and operations contractor for Yucca Mountain began in February 2001. This new contractor (Bechtel SAIC) will be re-assessing all of the cost estimates In addition, future budget requests for the Program have yet to be established, and, in any event, will be determined through the annual Executive and Congressional budget process.
- This table is based upon the design and construction estimates compiled to date without enhanced modularization opportunities.
- The defense contribution estimate incorporates the FY 2001 enacted budget including the outyears through FY 2006, and the assumption that beginning in FY 2006 appropriation is constant through 2010.
- The defense catchup estimate is based on the need to have the Department caught up by the waste emplacement date of 2010, in order for DOE fuel to be accepted at the repository.
- The Nuclear Waste Fund appropriations is based on the FY 2001 enacted budget, including the out-years through 2006, and the assumption that FY 2006 appropriation is constant
- CBO Baseline as of 1/2001.



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

March 28, 2001

Eric J. Fygi
Acting General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Room 6A245
Washington, DC 20585

Re: Opinion Request Regarding Source of Funds to Pay Anticipated Money
Judgments Arising From Pending Litigation With Certain Utilities

Dear Mr. Fygi:

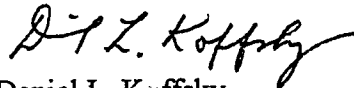
This is in response to your office's renewed request for our opinion about the proper source of payment of adverse money judgments your office anticipates in view of the decisions of the Court of Appeals for the Federal Circuit in the cases of *Northern States Power Co., Maine Yankee Power Co., Connecticut Yankee Atomic Power Co., and Yankee Atomic Elec. Co. v. United States*, Fed. Cir. Nos. 99-5096, 5138, 5139, 5140 (Aug. 31, 2000). The question of the proper source of funding for any damages incurred by utilities as a result of the Department of Energy's breach of the Standard Contract, 10 C.F.R. Part 961, for disposal of nuclear waste has been made an issue in litigation filed in the United States Court of Appeals for the Eleventh Circuit, *Alabama Power Company, et al. v. United States Department of Energy*, No. 00-16138-JJ (11th Cir. filed Nov. 22, 2000). In light of the *Alabama Power* litigation, the relevant offices in the Department of Justice have determined that it is most appropriate to take positions on the proper source of funding in the Department's briefs in that litigation rather than through an opinion from the Office of Legal Counsel. Moreover, it is the established practice of this Office not to give legal opinions about matters pending in litigation. See, e.g., *Jurisdiction of the Attorney General - Certain Cases in Which the Attorney General Will Not Render An Opinion*, 38 Op. Att'y Gen. 149, 150 (1934) ("This Department has heretofore followed the practice of declining to render opinions upon questions contemporaneously pending before the courts for determination and which are within their competency to decide."); John O. McGinnis, *Executive Branch Interpretation of the Law*, 15 Cardozo L. Rev. 375, 426 & n.195 (1993); Frank M.

Eric J. Fygi
Acting General Counsel
Department of Energy

Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A.J. 33, 34 (1971).

Please let me know if you have any questions regarding this issue.

Sincerely,

A handwritten signature in dark ink, appearing to read "D. L. Koffsky", written in a cursive style.

Daniel L. Koffsky
Acting Assistant Attorney General

cc: Stuart Schiffer
Acting Assistant Attorney General
Civil Division